IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.
FILED
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MICHAEL RODAK, JR.,

No. 71-5139

GENE HAM,

Petitioner,

v.

STATE OF SOUTH CAROLINA.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at 256 S. C. 1, 180 S.E.2d 628 (1971) and is set out in the Appendix (A. 100). Petitioner was convicted upon trial by jury in the Court of General Sessions of Florence County, South Carolina, and there is no opinion with respect to that conviction.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 7, 1971 and a timely petition for rehearing was denied on April 28, 1971 (A. 106). The petition for writ of certiorari was filed on July 24, 1971 and certiorari was granted on January 24, 1972. The juris-

diction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether the trial judge's refusal to examine the jurors on voir dire as to whether they were prejudiced against petitioner because of his race or because of their exposure to pretrial publicity violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner Gene Ham is a black civil rights worker who has long been active in the civil rights movement in Florence County, South Carolina (A. 73). On June 3, 1970 he was convicted after a jury trial in the Court of General Sessions of Florence County of possession of marijuana and sentenced to eighteen months upon the public works of the county or in the state penitentiary (A. 2).

Petitioner was arrested by three police officers on the afternoon of May 15, 1970 on the basis of several warrants that had been issued for his arrest (A. 4-7, 49). After his arrest he was frisked on the street, placed in a patrol car and taken to the police station (A. 75). There he was booked and asked to take everything out of his pockets (A. 50). According to the police officers, he removed eight packages from his pocket which were opened, examined, and found to contain somewhat less than an ounce of marijuana (A. 50, 60). An additional warrant charging him with possession of marijuana was then issued (A. 53).

After a preliminary hearing on May 28th and 29th, petitioner was bound over to the grand jury on each of the five charges against him, including possession of marijuana (A. 2). He was indicted on each charge on June 1st (A. 2), and on June 2nd the possession of marijuana charge was called for trial in the General Sessions Court (A. 8).

Petitioner's motion for a continuance on the ground that he had not been able, on one day's notice, to file motions or prepare for trial was denied, and counsel was directed to make all motions orally (A. 11). His motion for a change of venue or for a continuance on the ground of prejudicial publicity was summarily overruled (A. 12). A brief hearing was then held on his motion to strike the petit jury venire on the ground that Negroes had been systematically excluded (A. 17). Despite his showing that only six (17%) of the thirty-six petit jurors who were available for his case were black although 32% of the names in the jury box were of blacks, and that the trial venire was selected from slips of paper on which the race of the juror was indicated, the motion was denied (A. 31-32). Over petitioner's objection, the trial on the merits was set for the following day (A. 32).

At the beginning of the selection of the jury, petitioner requested that the judge put the prospective jurors on voir dire and ask them the following questions:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term "black?"
3. Would you disregard the fact this defendant wears a beard in deciding this case?
4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?" (A. 35-36).

The judge refused to ask any of these proposed questions on the ground that "[t]hey were not relevant" (A. 35). Instead, he asked generally whether any member of the panel was related by blood or marriage to petitioner (A. 35), and addressed the following three questions to each juror individually:

"Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

"Are you conscious of any bias for or against him?

"Can you give the State and the defendant a fair trial?" (A. 36-48).

Two jurors were excused by the court because of their answers to these questions.[1] No one was challenged for cause by either the State or petitioner, but each side exhausted its five peremptory challenges (A. 37, 39, 40, 41, 42, 44, 46, 47).

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[1] One juror answered in the affirmative to the first two questions (A. 42), and one juror answered "no" to the third question (A. 47).

The State's case consisted only of testimony that eight packages had been discovered among petitioner's personal belongings when he had been searched at the police station after his arrest (A. 50), and that the packages had been found to contain a small quantity of marijuana (A. 60). Petitioner took the stand in his own defense and testified that the first time he had seen the package was when he removed the contents of his pockets (A. 76). He stated that he had not had the packages in his possession at any time before he was arrested, and could only speculate that the police officers had planted them in his pockets when he was frisked or later at the police station (A. 77). He also testified that he had heard that the local police were "out to get him" because of his civil rights activities, which included working for the Southern Christian Leadership Conference (SCLC) and being a member of the Bi-Racial Committee of the City of Florence (A. 71, 73-74, 85).

The jury returned a verdict of guilty and, despite the fact that it was a first offense, petitioner was sentenced to eighteen months imprisonment (A. 92). A motion for judgment notwithstanding the verdict or for a new trial, which preserved his rights on appeal under all motions and objections raised during the trial, was denied (A. 92).

On appeal, petitioner assigned as error the refusal of the trial court to examine the jurors on voir dire with respect to racial prejudice or their exposure to pretrial publicity and argued that such refusal violated his right to an impartial jury guaranteed by the Fourteenth Amendment to the Constitution.[2] A divided South Carolina Supreme Court affirmed petitioner's conviction. The majority held that the trial judge had asked the basic questions required by §38-202 S. C. Code (1962),[3] and had not abused his discretion in refusing to ask others.

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[2]Brief of Appellant, p. 15; Reply Brief, pp. 3-7.

[3]This section provides:

"§38-202. *Jurors may be examined by court; if not indifferent, shall be set aside.* — The Court shall, on motion

Noting that petitioner was a "black, bearded, civil or human rights activist," two of the five Justices dissented on the ground that the trial court's refusal to examine the jurors was in conflict with the decision of the United States Supreme Court in *Aldridge v. United States*, 283 U.S. 308 (1931), which they considered binding on the States. A petition for rehearing was denied over the same dissenting votes (A. 106).

ARGUMENT

THE TRIAL JUDGE'S REFUSAL TO EXAMINE THE JURORS ON VOIR DIRE AS TO WHETHER THEY WERE PREJUDICED AGAINST PETITIONER BECAUSE OF HIS RACE OR BECAUSE OF THEIR EXPOSURE TO PRETRIAL PUBLICITY VIOLATED PETITIONER'S RIGHT TO AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth and Fourteenth Amendments guarantee a criminal defendant a trial by an impartial jury. *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Duncan v. Louisiana*, 391 U.S. 717 (1961); *Irvin v. Dowd*, 366 U.S. 717 (1961). This Court has said:

> "In essence, the right to jury trial guarantees to the accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155 b. His verdict must be based on evidence developed at the trial . . ." [4]

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of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause and another shall be called."

[4] *Irvin v. Dowd, supra*, 366 U.S. at 722.

Unless the impartiality of the jury can be assured, the fundamental right to a fair trial will itself be rendered meaningless.

It cannot be doubted that the right to an impartial jury requires a panel of jurors who are free from prejudice against the defendant because of his race or because of their exposure to pretrial publicity. As long ago as 1880 this Court held that the "apprehended existence of prejudice" against a black criminal defendant from a jury from which blacks had been systematically excluded required the reversal of his conviction. *Strauder v. West Virginia*, 100 U.S. 303 (1880). In order to prevent racial prejudice from affecting the impartiality of juries, an unbroken line of cases since that time has condemned any racial discrimination in the jury selection process. *Whitus v. Georgia*, 385 U.S. 545 (1967). Similarly, the right of the accused to a jury determination based only upon the evidence presented at a trial has been recognized as one of the fundamental guarantees of due process. *Irvin v. Dowd, supra*, 366 U.S. at 722; *Thompson v. City of Louisville*, 362 U.S. 199 (1960). And this Court has been particularly sensitive to the denial of this right by prejudicial publicity and extra-judicial statements. *Parker v. Gladden*, 385 U.S. 363 (1966); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1956); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

It is well established that where federal constitutional rights such as the right to an impartial trial are at stake, federal law requires that the States make available the means that are necessary to safeguard those rights. *Swenson v. Bosler*, 386 U.S. 258 (1967).[5] Only recently this Court

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[5] In several different areas, this Court has held that specific state court procedures are necessary to adequately insure the protection of federal rights. Thus, a state court is constitutionally required to give a statement of reasons for an increased sentence after a second conviction of a successful appellant in order to provide assurance that he is not being penalized for the exercise of his right to appeal, *North*

recognized that since a change of venue may provide the only means by which to assure an impartial jury, a State could not constitutionally bar changes of venue in all misdemeanor cases. *Groppi v. Wisconsin, supra.* Thus, it was held that "under the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case." *Id.* at 511. (Emphasis in original). Just as a defendant is constitutionally entitled to show that a change of venue is required to insure an impartial jury, *Groppi v. Wisconsin, supra*, so too must he be entitled to an adequate means to select an impartial jury in the venue in which he is tried. In the present case, petitioner contends that his right to an impartial jury can only be vouchsafed if he is given a meaningful opportunity to challenge for cause prospective jurors who are prejudiced against him because of his race or because of their exposure to pretrial publicity.

The right to challenge prospective jurors for cause on account of bias or prejudice is essential to the constitutional guarantee of an impartial trial because it is the principal, if not the only, means by which a criminal defendant can secure an impartial jury.[6] Even the fairest procedures by which master jury lists are compiled can at best only

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Carolina v. Pearce, 395 U.S. 711 (1969); it cannot sentence a defendant on a guilty plea where any aspect of the prosecutor's plea-bargaining promise has not been kept, in order to insure against the involuntary waiver of his constitutional right to a jury trial, *Santobello v. New York*, ___ U.S. ___, 30 L.Ed.2d 427 (1971); it cannot accept a guilty plea unless the prerequisites of the plea affirmatively appear on the record, *Boykin v. Alabama*, 395 U.S. 238 (1969); and it must give a defendant an opportunity to introduce evidence in support of his claim that the jury selection procedure violated his rights under the Fourteenth Amendment, *Coleman v. Alabama*, 377 U.S. 129 (1964); *Reece v. Georgia*, 350 U.S. 65 (1956).

[6]See W. FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852); DEVLIN, TRIAL BY JURY 30-31 (1956); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 354 (1960).

provide juries that represent a "cross-section" of the community and cannot guarantee that the jurors selected will be unbiased toward a particular defendant. *Carter v. Jury Commissioner*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970). Similarly, the right to a continuance or to a change of venue only serves to reduce the likelihood of prejudice to a defendant which may result from community hostility in connection with a particular case. *Irvin v. Dowd, supra*; *Rideau v. Louisiana*, 373 U.S. 723 (1963). Indeed, a continuance or change of venue is available in many jurisdictions only after a defendant has been unable to secure an impartial jury through his exercise of challenges.[7] It is, therefore, only through the right of challenge that the defendant can eliminate from the jury which may strip him of liberty or life those individuals who are actually prejudiced against him. As one authority has stated:

> "Trial by jury will be useless as a safeguard for the subject . . . if it means trial by a packed jury. Therefore the precautions which the law takes to secure that a jury is unbiased and independent must be preserved . . ."[8]

The right of challenge for cause on account of bias or prejudice is also a fundamental component of the right to a jury trial. As this Court has recognized, "the right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S. 370, 376 (1892). As early as the middle of the thirteenth century, Bracton wrote that exceptions could be taken to individual jurors on the ground of a previous conviction for perjury, serfdom, consanguinity, affinity, enmity, or close friendship.[9] And by the middle of the fifteenth century, most of

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[7] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Fair Trial and Free Press*, 126-127 (Approved Draft 1968).

[8] DEVLIN, *supra*, n. 5, at 31

[9] 1 BUSCH, LAW AND TACTICS IN JURY TRIALS 9 (Encyl. ed. 1959).

the incidents of the modern jury trial, including the right of challenge, had become settled.[10] Although a specific reference to the right of challenge was not included in the Sixth Amendment,[11] it has always been recognized in this country as a fundamental element of a jury trial, embraced by the guarantee of an "impartial" jury.[12] It is guaranteed to a criminal defendant under the law of every State and

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[10] *Ibid.*

[11] Because of the objections to the absence of an explicit provision saving the right to challenge prospective jurors in Article III of the Constitution, the Sixth Amendment originally contained such a provision when introduced in the House by James Madison. HELLER, THE SIXTH AMENDMENT 24 (1951). This version provided that:

> "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites . . ." 1 ANNALS OF CONG. 435 (1789).

Largely at the insistence of the Senate, however, the Amendment was altered to eliminate the specific references to the common law features of a jury trial. HELLER, *supra* at 31-33. The reason for these deletions is unclear because there is no record of the Senate debates on the Sixth Amendment. *Id.* at 31. However, in two letters to Edmund Pendleton, Madison wrote that the vicinage requirement was the only feature of the common law jury that was specifically objected to by the Senate. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491, 492-93 (1865); see *Williams v. Florida*, 399 U.S. 78, 94-96 (1970). In the absence, therefore, of any concrete evidence that the Senate opposed the right of challenge, its deletion from the Amendment cannot be taken as an indication that Congress did not intend the right of challenge to be part of the constitutional right to a jury trial. On the contrary, it is at least as likely that the Senate's action in streamlining the Madison version rested on the "assumption that the most prominent features of the jury would be preserved as a matter of course." *Williams v. Florida, supra*, 399 U.S. at 123 n. 9 (Harlan, J. Concurring).

[12] HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 71 (1951); see *Dennis v. United States*, 339 U.S. 162 (1950); *Pointer v. United States*, 151 U.S. 396 (1894); *Lewis v. United States*, 146 U.S. 370 (1892).

the District of Columbia,[13] and is established practice in the federal courts.[14] The right of challenge for cause, therefore,

[13]The right of challenge is guaranteed specifically by statute in most states, and in other states by either court rule or decisional law. See ALA. CODE, Tit. 15, §55 (1958); ALASKA STAT. §09.20.090 (1962); ARIZ. R. CRIM. P. 219 (1956); ARK. STAT. ANN. §43-1915 (1964); CAL PEN. CODE §1066 (West's 1970); *Jones v. People*, 23 Colo. 276, 47 Pac. 275 (1898); *State v. Smith*, 49 Conn. 376 (1881); DEL. SUPER. CT. (CRIM.) R. 24 (1948); D.C. CODE GEN SESSIONS CT. R. 24 (by inference) (1961); FLA. STAT. ANN. §913-02(2) (1969); GA. CODE ANN. §59-804 (1965); HAWAII REV. STAT. §635-28 (1968); IDAHO CODE ANN. §§19-2012, 2013, 2016 (1948); ILL. REV. STAT. ch. 38, §115-4 (1965); BURNS IND. STAT. §9-1054 (by inference) (1956); IOWA CODE ANN. §§779.6 (1946); KAN. STAT. §22-3410 (1971); KY. REV. STAT. R. CRIM. P. §§9.36, 9.38 (1970); LA. CONST. ART. I §10; LA. STAT. ANN. CODE CRIM. P. §797 (1967); ME. REV. STAT. ANN., tit. 15, §1259 (1969); MD. ANN. CODE, tit. 51, §§10, 18 (1957; MASS. ANN. LAWS ch. 234, §28 (1956); MICH. COMP. LAWS ANN. §768.9 (1948); *People v. Wheeler*, 96 Mich. 1, 55 N.W. 371 (1893); MINN. STAT. ANN. §631.28 (1945); MISS CODE ANN. §1802 (by inference) (1942); MO. REV. STAT. §§546.120-546.160 (1959); MONT. REV. CODE, tit. 95, §1909 (1947); NEB. REV. STAT. §29-2006 (by inference (1964); NEV. REV. STAT., tit. 14, §175.036 (1967); N.H. REV. STAT. ANN., ch. 606, §3 (1955); N. J. STAT. ANN., tit. 2A §78-7 (1952); N. M. STAT. §19-1-14 (1953); N. Y. CRIM. PROC. L. §270.20 (McKinney's 1971); N. C. GEN. STAT. §9-15 (1969), N. D. CENT. CODE §29-17-32 (1960); OHIO REV. CODE §2945.24 (by inference) (1971); OKLA. STAT. ANN. §656 (1969); ORE. REV. STAT. §§ 17.165, 136.210 (1961); PA. STAT. tit. 19 §811 (1964); R. I. GEN. LAWS §9-10-14 (1956); S. C. CODE OF LAWS §38-202 (1962); S.D. COMP. LAWS §§23-43-28, 23-43-29 (1967; TENN. CODE §22-301 (1956); TEX. CODE CRIM. P. (Vernon's Ann.) Art. 35.16 (1965); UTAH CODE §77-30-16 (1953); VT. ANN. STAT., tit. 12 § 1941 (1947); VA. CODE §§ 8-199, 19.1-206 (1960); WASH. REV. CODE ANN. §10.49. 040 (1961); W. VA. CODE §62-3-4 (1966); WIS. STAT. ANN. §§957.14, 290.16 (1957); WYO. STAT. §7-222 (1957); WYO. R. CRIM. P. 25 (1968). See ALI CODE OF CRIMINAL PROCEDURE, 109-110, 822 (Official Draft 1931); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* 67 (Approved Draft 1968).

[14]FED. R. CRIM. P. 24(a); see 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE 38 (1969).

is not only essential to the enforcement of the right to an impartial jury, but it has an independent source in the Sixth Amendment's right to a jury trial.

In order to exercise effectively his constitutional right to challenge for cause jurors who are prejudiced against him by reason of his race or pretrial publicity, a criminal defendant must be provided with some procedure for examining prospective jurors with respect to their biases and prejudices. As this Court has said, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-172 (1950). And the right of challenge would indeed be a hollow guarantee unless the defendant were "brought face to face in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice." *Pointer v. United States*, 151 U.S. 196, 409 (1894).[15]

In the absence of a voir dire examination, the only means that a defendant would have of discovering the existence of grounds upon which he could exercise a challenge for cause would be to investigate prospective jurors prior to the commencement of the trial. But such a possibility does not provide a realistic alternative to a voir dire examination. Not only would such an investigation be unlikely to disclose the biases and prejudices that a juror will only reveal when he is put on oath and examined by the court or counsel, but there would be no way to lay the foundation for the exercise of a challenge for such a cause without questioning the juror himself. The practical impossibility, moreover, for a criminal defendant, who may be indigent, to conduct an extensive investigation of a trial venire in the

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[15] See also *Morford v. United States*, 339 U.S. 258, 259 (1950); *Aldridge v. United States*, 283 U.S. 308 (1931); *Brown v. United States*, 119 U.S. App. D.C. 203, 338 F.2d 543 (D.C. 1964); *Bailey v. United States*, 53 F.2d 982, 984 (5th Cir. 1931); *People v. Boulware*, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971).

limited time between its publication and the time of trial severely limits its usefulness.[16] Finally, any procedure which encouraged pretrial contact between a defendant and prospective jurors might itself impair their impartiality and be open to serious abuse.[17] It is for these reasons that a voir dire examination of prospective jurors in connection with the exercise of challenges for cause has been widely recognized as the principal, if not the only, means of selecting an impartial jury.[18] The practice is deeply rooted in the history of trial by jury,[19] and is the right of a criminal defendant in the fifty States, the District of Columbia and the federal courts.[20]

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[16]In the present case, the trial venire of 50 persons was not selected and summoned until ten days before the term of court at which petitioner was tried, in accordance with §38-61, S. C. CODE (1962) (A. 28). There is, moreover, no requirement that the defendant be provided with a list of the veniremen prior to the day of the trial. See *Stone v. United States*, 324 F.2d 804 (5th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958), *cert. denied*, 359 U.S. 196 (1959); cf. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial By Jury* §2.3 (Approved Draft 1968).

[17]See *Kiernan v. Van Schaik*, 347 F.2d 775, 780 (3rd Cir. 1965) ("The impartiality of jurors should be tested under the control of the court rather than by the unsupervised activities of investigators with all the undesirable possibilities of intimidation and jury tampering which such surveillance inevitably presents.")

[18]See Note, *supra* n. 5, 60 COLUM. L. REV. at 354; DEVLIN, *supra*, n. 5, at 31-33.

[19]Blackstone described the practice at common law as follows:

> "A juror may himself be examined on oath of *voir dire, veritatem dicere* (to speak the truth) with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage." 3 W. BLACKSTONE, COMMENTARIES 363 (Cooley ed. 1899).

[20]The right to conduct a voir dire examination is guaranteed specifically by statute in most states, and in other states by either court rules or decisional law. See ALA. CODE, tit. 15, §52 (1958); ALASKA STAT. §09.20.090 (1962); ARIZ. R. CRIM. P. 217 (1956);

By refusing to ask the questions proposed by petitioner, the trial judge effectively denied petitioner any opportunity to have the prospective jurors examined on voir dire with respect to whether they were prejudiced against him.

ARK. STAT. ANN. §39-226 (1962); CAL. PEN. CODE §1078 (West 1969); *Zancannelli v. People*, 63 Colo. 252, 165 Pac. 612 (1917); CONN. GEN. STAT. ANN. §51-240 (Cum. Supp. 1967); DEL. CODE §11-3301 (1953); DEL. SUPER. CT. (CRIM.) R. 24 (1948); D.C. CODE GEN. SESSIONS CT. R. 24 (1961); FLA. STAT. ANN. CRIM. PRO. R. §1.290 (1968); GA. CODE ANN. §59-806 (felony); *Nobles v. State*, 127 Ga. 212, 56 S.E. 125 (1906) (misdemeanor); (1965); HAWAII REV. STAT. §635-27 (1968); *State v. Hoagland*, 39 Idaho 405, 228 Pac. 314 (1924); ILL. REV. STAT. ch. 38, §115-4(f) (1965); *Epps v. State*, 102 Ind. 539, 1 N.E. 491 (1885); *State v. Dooley*, 89 Iowa 584, 57 N.W. 414 (1894); KAN. STAT. ANN. §22-3408(3) (Cum. Supp. 1971); KY. REV. STAT. R. CRIM. P. §9.38 (1970); LA. CONST. ART. I. §10; LA. STAT. ANN. CODE CRIM. P. § 786 (1967); ME. REV. STAT. ANN., tit. 15, § 1258 (1969); MD. ANN. CODE, Rule 745 (1971); MASS. ANN. LAWS, ch. 234, § 28 (1956); MICH. COMP. LAWS ANN. §768.8 (1948); *People v. Wheeler*, 96 Mich. 1, 55 N.W. 371 (1893); MINN. STAT. ANN. §631.26 (1945); MISS. CODE ANN. §1802 (1942); *State v. Mann*, 83 Mo. 589 (1884); MONT. REV. CODE, tit. 95 §1909 (c) (1947); NEB. REV. STAT. §29-2004 (1964); NEV. REV. STAT., tit. 14 §175.031 (1967); N. H. REV. STAT. ANN., ch. 500-A:32; 606:1, (Cum. Supp. 1971); N. J. STAT. ANN. tit. 2A §78-4 (1952); N. M. STAT. §21-1-1 (47a) (1953); N. Y. CRIM. PROC. L. §270.15 (McKinney's 1971); N. C. GEN. STAT. §9-15 (1969); N. D. CENT. CODE §29-17-28 (1960); OHIO REV. CODE §2945.27 (1971); *Roberson v. State*, 456 P.2d 595 (Okla. Crim. 1968); ORE. REV. STAT. §136.210 (1961); PA. STAT., tit. 19 §811 (1964); R.I. GEN. LAWS § 9-10-14 (1956); S. C. CODE OF LAWS § 38-202 (1962); *State v. Gurrington*, 11 S. D. 178, 76 N.W. 326 (1898); *Foute v. State*, 83 Tenn. 712 (1885); TEX. CODE CRIM. P. (Vernon's Ann.), Art. 35.17 (1965); *State v. Morgan*, 23 Utah 212, 64 Pac. 356 (1900); *State v. Mercier*, 98 Vt. 368, 127 Atl. 715 (1925); VA. CODE §§8-199, 19.1-206 (1960); *State v. Marfaudile*, 48 Wash. 117, 92 Pac. 939 (1907); *State v. Stonestreet*, 112 W. Va. 668, 116 S.E. 378 (1932); WIS. STAT. ANN. §§957.14, 270.16 (1947); WYO STAT. R. CRIM. P. 25 (1968). See ALI CODE OF CRIMINAL PROCEDURE, 109-110, 822 (Official Draft 1931); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* 67 (Approved Draft 1968). FED. R. CRIM. P. 24 (a).

Clearly, the three general questions the judge put to the jurors relating to their impartiality were inadequate to elicit meaningful responses. It is widely recognized that the mere statement by the juror in response to a general query that he can be impartial is entitled to little weight. As one federal court concluded:

> "[M]erely going through the form of obtaining juror's assurances of impartiality is insufficient. . . . [W]hether a juror *can* render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness *without something more*" (Emphasis in original).[21]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors'."[22]

A specific inquiry into prejudices of the jurors resulting from racial bias or pretrial publicity was particularly vital under the circumstances of the present case. As noted by the two dissenting Justices of the South Carolina Supreme Court, petitioner is a "black, bearded, civil or human rights activist" whose role as an SCLC worker had gained him notoriety in Florence County (A. 71, 73-74). The outcome of the prosecution against him for the possession of marijuana depended solely upon weighing the credibility of a white police officer who claimed that he had found the drug in petitioner's possession while searching him, and of petitioner who testified that he did not have the marijuana in his possession and that he was being "framed" by the authorities because of his involvement in civil rights. The case was, moreover,

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[21] *Silverthorne v. United States*, 400 F.2d 627, 638-39 (9th Cir. 1968); see also *United States v. Carter*, 440 F.2d 1132, 1134 (6th Cir. 1971).

[22] *Silverthorne v. United States, supra*, 400 F.2d at 640; see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra*, n.6, at 130-134.

of unusual interest because of the recent concern and publicity in Florence over a serious "drug problem" (A. 36). Indeed, the police officer who was the State's chief witness had recently appeared on local television on a program devoted to violation of the drug abuse laws (A. 36). Petitioner's motions to quash the trial venire on the ground that blacks had been systematically excluded and for a change of venue or continuance on the ground of pretrial publicity, furthermore, alerted the trial judge to the possibility that prospective jurors might be prejudiced against him (A. 12, 15).

This Court has itself recognized that inquiries of the nature sought by petitioner are essential to the guarantee of an impartial trial. In *Swain v. Alabama*, 380 U.S. 202, 221 (1965), the Court noted that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." And in *Aldridge v. United States*, 382 U.S. 308, 310 (1931), this Court reversed a conviction on the ground that the refusal of a federal trial judge to ask prospective jurors a question relative to racial prejudice in a case of a black defendant who was charged with shooting a white policeman violated "the essential demands of fairness." Federal courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect to racial prejudice,[23] and such questions have been widely approved by state courts.[24]

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[23] *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *King v. United States*, 362 F.2d 968 (D.C. Cir. 1966); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1959); *United States v. Dennis*, 183 F.2d 201, 227, n. 35 (2d Cir.), *aff'd* 341 U.S. 494 (1951).

[24] *Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27 Fla. 370, 8 So. 837 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W.2d 166 (1938); *Johnson v. State*, 88 Neb. 565, 130 N.W. 282

The right to conduct an inquiry into whether the jurors have been prejudiced by pretrial publicity is implicit in the decisions of this Court. *Irvin v. Dowd, supra*; *Rideau v. Louisiana, supra*; *Sheppard v. Maxwell, supra*. Unless there had been such a voir dire examination in these cases, this Court would have been completely unable to assess the impact of the pretrial publicity on the impartiality of the jurors. And a defendant who has a right to a hearing to show that he is entitled to a change of venue because of pretrial publicity surely must also be entitled to show that a particular juror is not impartial for the same reason. *Groppi v. Wisconsin, supra*.[25]

In affirming petitioner's conviction, the South Carolina Supreme Court held that the trial judge did not abuse his discretion in refusing to examine the jurors as requested in view of the fact that petitioner "failed to carry the burden of showing that [the] questions should have been asked to assure a fair and impartial jury" (A. 102).[26] But the judge was fully aware of petitioner's race, the nature of the prosecution, the existence of pretrial publicity, and the proposed questions were reasonably designed to disclose the prejudices of jurors.[27] Under the circumstances, the limita-

(1911); *People v. Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898); *State v. McAfee*, 64 N.C. 339 (1870); *Fendrick v. State*, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

[25]See ABA PROJECT STANDARDS FOR CRIMINAL JUSTICE, *supra*, n. 6 at 130-135; *Silverthorne v. United States, supra; Marson v. United States*, 203 F.2d 904 (6th Cir. 1953).

[26]The court did not indicate what kind of a showing a defendant must make before being permitted to make inquiries with respect to race or pretrial publicity. Although it is clear under South Carolina law that in examining prospective jurors on voir dire it is within the discretion of the trial judge to go beyond the questions that are required by § 38-202 S. C. CODE (1962), *State v. Peterson*, 255 S. C. 579, 180 S.Ed.2d 341 (1871); *State v. Britt*, 237 S. C. 293, 117 S.Ed. 379 (1960), the cases do not establish any standards for the exercise of that discretion.

[27]See *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970). In this case, the Fourth Circuit rejected the argument that this Court's

tion of the voir dire examination by the court deprived petitioner of the only means by which he could enforce his constitutional right to challenge for cause jurors who were not impartial towards him. Although the extent of examination to which a defendant is entitled and the manner in which it is to be conducted, i.e., by court, counsel or both, must of necessarily be left largely to the discretion of the trial judge depending on the circumstances of the particular case,[28] petitioner submits that minimal constitutional standards for the effective exercise of his right to an impartial jury required the trial judge to have permitted him some opportunity to probe for prejudice resulting from racial bias or pretrial publicity.

CONCLUSION

For the foregoing reasons, petitioner's conviction violated his right to be tried by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States

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decision in *Aldridge v. United States, supra,* should be limited to cases of interracial violence. The court held that the refusal to ask questions concerning racial bias could not be considered harmless error where, as in the present case, the defendant was black, the government's witnesses were white, and the outcome depended on weighing credibility. *Id.* at 1112.

[28] See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury*, §2.4 (Supp. 1968), giving the judge primary responsibility to conduct a voir dire examination but authorizing him to "permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable or proper."

Since counsel for petitioner did not seek to conduct the voir dire examination himself, this case raises no issue as to *who* should conduct the interrogation. Similarly, as the dissenting judges on the South Carolina Supreme Court recognized, the only question here is whether *any* inquiry into racial prejudice or the effect of pretrial publicity should be permitted, and not the extent of such inquiry.

Constitution. The judgment of the Supreme Court of South Carolina should be reversed and the case remanded for a new trial.

Respectfully submitted,

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